

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

**MISSOURI PUBLIC ENTITY RISK
MANAGEMENT FUND**

APPELLANT,

**v.
AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA**

RESPONDENT.

DOCKET NUMBER WD75446

DATE: April 30, 2013

Appeal From:

Cole County Circuit Court
The Honorable Patricia S. Joyce, Judge

Appellate Judges:

Division One: Gary D. Witt, Presiding Judge, Thomas H. Newton, Judge and Mark D. Pfeiffer, Judge

Attorneys:

Michael G. Berry, Jefferson City, MO, for appellant.

David P. Ellington, Kevin J. Adrian and Teresa M. Young, St. Louis, MO, for respondent.

MISSOURI APPELLATE COURT OPINION SUMMARY

**MISSOURI COURT OF APPEALS
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**MISSOURI PUBLIC ENTITY RISK
MANAGEMENT FUND,**

APPELLANT,

v.

**AMERICAN CASUALTY COMPANY
OF READING, PENNSYLVANIA,**

RESPONDENT.

No. WD75446

Cole County

Before Division One: Gary D. Witt, Presiding Judge, Thomas H. Newton, Judge and Mark D. Pfeiffer, Judge

Missouri Public Entity Risk Management Fund ("MOPERM") appeals the circuit court's summary judgment in favor of American Casualty Company ("ACC"). This action between the two insurers arose following the global settlement of an underlying wrongful death action brought by a nursing home patient which involved multiple tortfeasors. One of the tortfeasors in that underlying action, "Nurse," had primary insurance coverage through ACC and MOPERM provided excess coverage. For the remaining tortfeasors, MOPERM provided primary insurance coverage and ACC provided no coverage. MOPERM in this action sought a declaration of ACC's obligation to contribute toward the global settlement of all claims against all tortfeasors, which was paid entirely by MOPERM. The settlement needed to be concluded quickly so as to avoid further damaging discovery, which could have caused the damages in the case to increase dramatically for all tortfeasors, especially Nurse. ACC failed to participate in final settlement negotiations or pay any amount toward the settlement. MOPERM argues that the trial court erred in granting summary judgment in favor of ACC because it had set forth genuine issues of material fact as to its claims of equitable subrogation, unjust enrichment, and equitable contribution.

REVERSED AND REMANDED

Division One holds:

Open questions remain as to ACC's duty to defend, duty to settle in good faith, and duty to indemnify its insured. If ACC had deemed the proposed settlement on behalf of Nurse unreasonable, ACC could have rejected the proffered amount and continued to pursue a defense independently on behalf of Nurse. However, ACC did not participate in settlement negotiations, pursue a defense independently, or indemnify Nurse.

As to MOPERM's claim for equitable subrogation, we hold that (a) in avoiding the additional costs of litigation, which would have impacted both insurers, (b) in settling the case before the additional damaging facts were required to be disclosed, which would have substantially increased the damages that all tortfeasors could be subject to, (c) in maintaining its

duty to settle in good faith, and (d) in facing ACC's denial of primary coverage for Nurse and refusal to participate in good faith in the settlement, MOPERM advanced facts, which if proven, would provide sufficient reason to intervene by payment to the plaintiffs on behalf of all tortfeasors and so to be subrogated to the rights of Nurse in the underlying action on that debt.

As to MOPERM's claim for unjust enrichment, we hold that MOPERM has established a genuine issue of material fact as to whether ACC was unjustly enriched where it had its liability satisfied by a settlement in which it refused to participate, where the settlement amount was funded exclusively by MOPERM, and where it may be unjust to allow ACC to retain the benefit.

As to MOPERM's claim for equitable contribution, we hold that MOPERM pled facts that it jointly incurred obligations with ACC, that MOPERM paid those obligations, that MOPERM demanded contribution from ACC, and that ACC refused to contribute. ACC argues that MOPERM cannot survive its summary judgment motion on the claim of equitable contribution because the two insurers did not insure the same risk in that, as to Nurse, ACC held the primary coverage and MOPERM held excess coverage. However, because ACC was the primary insurer for Nurse and MOPERM was the primary insurer for other defendants in the underlying action and because the tortfeasors were jointly and severally liable, MOPERM may be entitled to some portion of the damages to be recovered from ACC.

Opinion by Gary D. Witt, Judge

April 30, 2013

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